

NO. 48730-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL DON OLMSTED, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 13-1-00226-4

SUPPLEMENTAL BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Senior Deputy Prosecuting Attorney
OID #91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION	1
STATEMENT OF THE CASE.....	1
ARGUMENT	15
I. Speedy Trial	15
II. Prosecutorial Misconduct	21
a. <i>Alleged misstatement of the law</i>	<i>21</i>
b. <i>Alleged misrepresentation of the evidence</i>	<i>24</i>
c. <i>Ineffective assistance of counsel.....</i>	<i>25</i>
III. Appellate Costs	26
CONCLUSION	26

TABLE OF AUTHORITIES

Cases

<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 2d 101 (1972) ...	16
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992)	17, 18, 20
<i>In re Schreiber</i> , 189 Wn.App. 110, 357 P.3d 668, 670 (2015).....	17
<i>Matter of Davis</i> , --Wn.2d--, --P.3d—(2016).....	18
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	23
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012)	23
<i>State v. Hughes</i> , 118 Wn. App. 713, 727, 77 P.3d 681 (2003)	22
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	24
<i>State v. Macon</i> , 128 Wn.2d 784, 911 P.2d 1004 (1996)	15
<i>State v. Magers</i> , 164 Wn.2d 174, 191, 189 P.3d 126 (2008)	22
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995)	22
<i>State v. Rafay</i> , 168 Wn.App. 734, 822, 285 P.3d 83 (2012).....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	22
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 455, 258 P.3d 43 (2011)	22

Rules

RAP 16.11	15
RAP 16.9	14

SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION

This Court appointed counsel for Olmsted. Olmsted's counsel has now filed a brief essentially reiterating several arguments Olmsted made in his PRP. Counsel chose to re-argue only three of the more than a dozen arguments Olmsted made in his initial Personal Restraint Petition brief. The State does not interpret that decision as an abandonment of those earlier claims, and fully incorporates its original "Response to Personal Restraint Petition" in this supplemental response. The responses to Olmsted's additional arguments that counsel chose not to re-argue in his supplemental brief are contained within that original response.

STATEMENT OF THE CASE

On the evening of January 31, 2013, Amy Yeager was at home with her boyfriend, Michael Olmsted, listening to music and having a few drinks. RP 266. Amy was not drunk. RP 266. At some point, Amy went to bed but was awoken by Olmsted. RP 268. He wanted her to make a phone call, but she wanted to stay asleep. RP 268. Olmsted said he was leaving and Amy, from a position on her stomach, kicked her feet upward to get the covers off her feet to get up. RP 268. Although she does not recall making contact with Olmsted, he claimed she kicked him "in the balls." RP 268. Amy described her movement as having donkey kicked the

blankets off her feet. RP 269. Amy vaguely remembered standing up, and Olmsted began punching her in the face. RP 270. The punches were closed fist. RP 270. Olmsted leveled at least ten blows on her head and face. RP 270. She tried to ward off the blows with her hands and yelled at him to stop. RP 270-71. Olmsted hit Amy so hard that she urinated in her pants. RP 270.

Amy did not intentionally kick Olmsted. RP 273. She would have been too scared to do that, even if they were in an argument, given his “snapping personality.” RP 273. Olmsted had assaulted Amy on at least four prior occasions. RP 271-73.

Olmsted briefly stopped punching Amy and she walked over to the built-in cabinets to retrieve clean pants. RP 274. She felt a coldness on her face and discovered that her face was bloody. RP 274. As she reached for clean pants, Olmsted began punching her in the face again. RP 275. He leveled at least five more blows on her face. RP 275. Her nose was swollen by this point and she could not breathe well. RP 276. She announced that she was going to the hospital, and Olmsted punched her several more times. RP 276. Amy thought that she may not make it out of the house. RP 277. Amy went to the bathroom to look at her face and wipe it off. RP 279. Olmsted came up behind her, calmer, and continually said “you kicked me in the balls,” as if to justify his behavior. RP 279. During

his rage, Olmsted broke a mirror and threw a television into the bathroom. RP 280. He also threw a pair of pliers at Amy and broke a blood vessel in her hand. RP 282.

She left the house and began walking to the hospital. RP 281-83. After a few blocks she realized he was following her. RP 284. He began yelling at her to give him her phone. RP 284. He was screaming so loud she could hear him from two blocks away. RP 285. She began walking faster and hid behind a dumpster. RP 285. But he followed her all the way until she reached the hospital. RP 286. She was afraid to use her phone because he would see. RP 286. Olmsted was not walking with a limp while stalking Amy to the hospital. RP 287.

Dr. Carolyn Martin, an emergency room physician, treated Amy that night. RP 122. Dr. Martin found that Amy had been hit multiple times in the face, so hard that she lost control of her bladder. RP 126. Amy had swelling and bruises on both sides of her jaw, forehead, and underneath both eyes. RP 126. Dr. Martin opined that the injuries could not have been caused by a single blow, based on the distribution of injuries, the facial planes, and how blood flows. RP 128. Amy's forehead alone must have sustained four or five blows. RP 128. Dr. Martin also opined that the earlier bruises appear, the more significant the soft-tissue injury. RP 129-30.

Lukas McNett lives at 3909 Washington Street in Vancouver. RP 155. He got off work sometime between 12:30 a.m. and 2:30 a.m. on February 1, 2013. When he arrived home, he sat in his car in front of his house social networking on his phone. RP 155. He saw a shadowy figure walking down the block about thirty feet away, and he locked his door out of habit. RP 157. The man reached his car and began passing it, but the next thing he knew the man was at his window yelling at him. RP 158. The man cuffed his hands against the window and yelled “What are you fucking looking at?” RP 158, 163. He also yelled “Do you have a fucking problem with me?” RP 158. Mr. McNett had never seen the man before and called 911. RP 158. The man who screamed at Mr. McNett that night was Olmsted. RP 164. Mr. McNett had never seen someone that angry. RP 164. Olmsted was “raging,” according to Mr. McNett, and his eyebrows were at an angle. RP 164.

During closing argument, the State made the following arguments that have been made the subject of Olmsted’s supplemental brief:

MS. NUGENT: Thank you, Your Honor. “I was frozen. I thought he was going to kill me. I knew I had to get out of this house.” We’re here today because of the Defendant’s rage. Rage when he attacked Amy, rage as he smashed items in the house, rage as he followed her, screaming at her in the night, rage as he tried to attack an innocent person in a car, rage as he taunted the police. We’re here because of that man and the crimes he committed. He’s here today charged with assault in the second degree for

causing substantial bodily harm to Amy Yeager. And the Judge gave you the jury instructions that define it and I'm going to go through that and match up how the evidence fits.

To convict the Defendant, I need to prove three things: I need to prove that on February 1st, 2013, he intentionally assault Amy Yeager; I need to prove that the Defendant thereby recklessly inflicted substantial bodily harm; and I need to prove that this happened in Washington.

So if we go to that first element, that on February 1st, 2013, the Defendant intentionally assaulted Amy Yeager, what's an assault? There's a definition that you will get, the Judge read, and an assault is any intentional touching or striking that is harmful or offensive, regardless of whether any physical injury is done. So any intentional touching or striking that is harmful or offensive, that's an assault. So that's our basic, low level of assault.

That means spitting on someone, that's an assault. That means slapping someone, that's an assault. That means punching them, that's an assault. So we have varying levels of assault, but the first thing I have to prove, he intentionally assaulted her.

The next element, that the Defendant thereby recklessly inflicted substantial bodily harm. And the definition for reck – reckless is a little wordy. It is "A person acts reckless if they know of and disregard a substantial risk that substantial harm may occur, and this disregard is a gross deviation from what a reasonable person would do." It goes on to say, "Recklessness is also established if a person acts intentionally." So if you're acting intentionally, you're also acting reckless.

So you're acting reckless when you know someone could get hurt, but you keep going. You're knowing something bad will happen when you're pounding on someone's face and you continue to pound on their face. That's reckless. And there's one reason you pound on someone's face: you

want to hurt them, you want to damage them, you want to break them.

So the next element that we have there, the Defendant thereby recklessly inflicted substantial bodily harm. So what does that mean, substantial bodily harm? There's a couple ways that I can prove substantial bodily harm. I only need to prove one of them. I'm alleging two here, but I only need to prove one. So substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement or, second way, a temporary but substantial loss or impairment of the function of any body part.

So let's talk about that first one, the temporary but substantial disfigurement. What does that mean? By definition, a disfigurement is any – any change to a person's appearance, any deviation. A pimple, anything can be a disfigurement. They can be permanent, scars; they can be temporary, for example, a hangnail. You know, you have a hangnail, that's a disfigurement. It's ugly, it's not what it's supposed to look like; that's a deviation from what you normally have.

But I don't think anyone would really argue that that's a substantial disfigurement. Yes, it's temporary, but it's not substantial. It's not affecting your quality of life, it's not affecting whether you can use your hand. When you go out in public, people aren't seeing it and are just aghast about what's going on. So that's a temporary disfigurement, but it's not substantial.

So what makes something substantial? It's immediately noticeable to people. People see it and instantaneously know what happened. It's substantial when it lasts for some time. It's substantial when you have injuries two weeks later. It's substantial when you have pain that lasts for over a week, two weeks, even. It's substantial when you have these bruises. It's substantial when you have scarring six months later, scarring that, when you look at it every day, it makes you think about what has happened. That's substantial.

So let's talk about the injuries in this case, what we have. Within an hour of this happening, we have Officer Long who is meeting with Amy Yeager at the urgent care clinic. She instantly said she sees black eyes developing even that quickly. Her nose is completely swollen. She has an abrasion, a huge bump up here. Both sides of her jaw are swelling. She also is bleeding from her nose.

And I want you to think about this: by the time Officer Long saw her, just about an hour had passed since these assaults. She is still bleeding from her nose, even after applying pressure all the way down to the hospital. That is a lot of strength. This is a huge force that makes you continue to bleed for an hour. She also testified her nose was so swollen she's having problems breathing out of it.

Four hours later, so after the urgent care tells her there's too many – too much going on here, we can't see you, you've got to go to the ER, four hours later, we know her injuries are worsening. They're deepening. Her – her jaw has continued to swell on each side. It's difficult for her to talk. We know she can't close her teeth together.

The next day, her entire head, her entire face is in pain. And she talks about this. She said for a solid week, she could not wear her glasses. Her nose was so swollen and so sore that she couldn't even take that little bit of pressure from her glasses. And you saw her: she wears her glasses every time she looked at a photograph, when she was asked to read; she needs those glasses, and that's what she testified to as well. For a solid week, she can't wear them. She told you she has to have other people read things for her, she can't really see anything, and to use her phone, she has to use a magnifying glass. That's substantial.

In the days that follow, she also talks about the bruises on her face, the bruises everywhere, and how it was impossible to cover them up. When I asked her is there any way you could put makeup, cosmetics to kind of, you know, make it look less bad, she said no, she couldn't even touch her face. She said at one point, for a solid week, she

can't touch her face because she's in so much pain. She says at one point, she accidentally glances her nose with her hand; for the rest of the day, severe, shooting pain. So she can't wear cosmetics. She can't even put it on because it hurts too badly. So those deep bruises all over her face, they're out there for everyone to see.

She testified that the injuries were so bad to every place except for the back of her head. The injuries are so bad, for up to a week, she couldn't even sleep anyway but exactly like this. If she turns from side to side, there's too much pain because of the swelling, because of the abrasions. When you can't sleep, when you can't turn for a week, that is substantial. That is highly affecting your quality of life, it's affecting the pain, the injury. It's not just what you look like, but how you just operate every day, how you go through your day.

And you think about when one of us has a night where one night we can't sleep with a toothache or something, and how miserable that is. For seven days, for a solid week, she said, "I can't do anything but lay like this and it hurts if I move." That's substantial.

And I want you to think about how this affects a person. I want you to think about how it affects a person when they have injuries like this for two solid weeks, and you're going out in public and you're seeing people. And she testified four or five days after this happened, she sees a friend at the Safeway, and she turns to look at the friend, and they start crying. They start crying because her face is so disfigured. She testifies about another friend who saw her and did not even recognize her because of the degree of disfigurement on her face. That is substantial.

And this is something you want to keep private. This is not something you want to share with the world. She is ashamed. She said she's embarrassed and this is a personal matter. She really doesn't want the world to know, but when this happens to your face, there's nothing you can do.

There's no way you can hide it; there's no way of getting around it.

It's not like if you have an abrasion on your arm, you wear a long-sleeved shirt. You know, if something happens to your knee, you don't wear a skirt. There's nothing you can do. It's your face. It's the very first thing every person looks at. She talks about when she's out in public, strangers, everyone's staring at her. Strangers are coming up and asking her what happened. This very private, horrible thing that has happened to her is out for everyone now, and it's not a day or two; this is two weeks of this bruising to her face.

And you know that when you see someone with injuries like this, you know when you see someone with injuries like this, you instantly wonder what's going on? Maybe you don't go and approach them, ask them, but you're wondering, is she an abused woman? What's happened to her? Why did she get beaten up? And then the judgment comes, whether it's pity, whether it's sympathy, whether it's anger, whatever it is. And she feels that every single time she goes out because of the disfigurement to her face.

And that scar, that scar on her arm, she – she has the scar on her arm, but she also has the scar on her eye, over here. And she told you that is a constant reminder, every single time she is getting ready in the morning, that is a constant reminder of what he did to her, of what happened, and it makes it all the more real. Every day, she thinks about that, and it's been six months.

So we know that a substantial bodily harm means a substantial but temporary disfigurement. That's what we just went over. And without question, the evidence has demonstrated this. But we also can prove substantial bodily harm by proving that she had a substantial but temporary impairment of any bod – body part or organ. So for example, "of an impairment of the function of any body part." It's kind of a weird term, but to give you an example, if I slam my finger in the door and it's really stiff, I have an

impairment of a body part. I can't really bend it, it hurts, but it's probably not substantial. I'm not a concert pianist, you know, it's not going to affect my quality of life. By tomorrow, it's probably going to be gone. People are not going to see it and think – think anything. I won't be embarrassed by it. So that's an impairment; it's temporary, but it's not substantial.

So what makes it substantial? The same things as before: the length of time, the length of time the injury is there, the pain that is associated with it, how it affects your daily life. We know in this case her jaw was impaired. There is no question. And no one is alleging that her jaw was broken. Never alleged that. I don't need to prove that for you to find him guilty. In no way do I need to prove that her jaw was broken. That's not what happened. But in this case, her jaw was impaired.

The officers who – the – Mary Jane Long, who spent nearly five hours with her, testified that upon seeing her, something was obviously wrong with her jaw. It has hanging, she had a hard time closing her mouth, she couldn't put her teeth together. She could put her lips together, couldn't put her teeth together, and she was mumbling, obviously in pain. That same officer testified in an unrelated, just ran into her about a month later, she sees Amy again. The difference is night and day. There's no injury, her jaw moves fine. So there was something wrong on that day, there's no question about it.

You heard from Officer Krebs who said the same thing. He only spent about 30 to 45 minutes with Amy, and that was later, at the ER, and he said it was clear, "I walk in, and it's clear something is wrong. She's nursing her jaw, she's holding it abnormally, she's having difficulty speaking." The doctor testified that both sides of her jaw were swollen and that she reported that she had difficulty closing her teeth together.

And Amy testified that for four days following this, she couldn't eat solid food. She couldn't eat solid food because

it hurt too badly. She couldn't chew. I mean, this is the kind of thing that happens after we get our wisdom teeth removed, but she got beaten so badly that she cannot bring her teeth together. This is a substantial impairment, a loss, a temporary loss of a bodily function. It affects how you speak, it affects how you move your mouth, it affects your ability to sleep at night. It's substantial.

I want to talk about the testimony of the witnesses. I want to talk about – first about Dr. Martin, that she said, without question, these injuries could not have come from a single blow to the face. It's not possible. She talked about the planes in your face and how things occurred. I mean, the reality is, we have an injury here, here, here, here, here, and your arm. That didn't come from a single blow.

She also told us – even though Amy testified she wasn't wearing glasses at the time, Defense was suggesting perhaps what would happen if someone was wearing glasses, would that be responsible? And the – the doctor testified absolutely not. In fact, glasses would protect your face from this kind of harm. You'd have a cut on the bridge, but it would protect you from this. We know that's not the case, here. The injuries are not consistent with Amy wearing glasses. For one, she was sleeping at the time; it wouldn't have made sense to wear glasses. She didn't have glasses on. There's nothing in the evidence to support that.

She also testified that these injuries came from at least, in her words, four to five blows. At least four to five blows, from the medical doctor. This is what she does; she works in the ER at night. This was not a single slap to the face.

You heard from Lukas McNett. He was that 911 caller, that young man. He says he watches the Defendant and the Defendant is walking perfectly normally. I want you to think about Lukas: he has absolutely no stake in this. He doesn't know him, he doesn't know Amy, he's never seen them before. And he testifies that this guy comes up to his window, more aggressive and more angry than he has ever seen a person, screaming at the top of his lungs, "Do you

want to fucking go” What’s your fucking problem?” And he is clear about what was said to him. He is clear about what was said. This is another example of the Defendant’s rage, another example of the Defendant’s aggression, which is exactly in line with what he did to Amy just moments before that.

You heard from Officer Long, and we already talked about the injuries she observed, the impairment to Amy’s jaw, how it got worse. She told us that when she saw the Defendant, he was walking just fine, absolutely no problem. In fact, he crossed two full blocks in the very short amount of time that it took for her to turn her car around, and he was fine just walking down the street. She rolls up to him, says, “Hey, what’s going on?” He turns and sees her, and then a very pronounced limp develops that was not there before.

She asks him if he needs medical care. He said no, and then he becomes highly combative, screaming, tensing his body, telling her to fuck off. Evidence of his aggression, evidence of his rage, consistent with Lukas, consistent with Amy. His behavior is the same from Amy, to Lukas, to Officer Long.

Then we have Officer Krebs. He says he arrives on-scene to help and the Defendant is agitated, screaming, he’s twenty to thirty feet away when he gets out of his car, and he can hear him screaming at Officer Long. He describes how combative, how aggressive he is. Again, aggression, rage, consistent with Amy, consistent with Lukas, consistent with Officer Long, now we have Officer Krebs, all saying the same thing about his behavior.

Then you have Officer Krebs who says he goes to the hospital, he goes to the hospital to see Amy, and he instantly notices her injuries. And when questions why six months later he can so vividly remember what she looked like, he said because it was so substantial. Six months after the fact, that’s what he remembers.

You heard from Officer Bettger, and he was the booking officer when the Defendant comes in, and he talks about how the Defendant had a level, a registerable level of alcohol in him, a .08, and about how agitated and very uncooperative he was. Very uncooperative, the same as he had been with Am, the same as he had been with Lukas, the same as he had been with Officer Long, Officer Krebs, and now Officer Bettger. The exact same behavior from start to finish. You heard that he twice refused to do a medical assessment. Two times. Too agitated, too uncooperative.

And you heard from Amy Yeager: she told you he attacked her and she didn't know if she would make it out, and she couldn't believe that he came at her when her face was covered in blood. She knew she had to get out of that house, and she told you she had never called the police before. She didn't want to call the police. But this time was different. And she talked to you about the fear she felt as she's walking, hurt, one o'clock in the morning, down the road, and she hears him behind her, screaming. But something makes her keep going, to walk faster, to get away, to hide behind that dumpster.

She told you that even once she got to the hospital, and you hear it on the 911 call, when she got to the hospital, she's still in so much fear she says, "I'm hiding in the back of the hospital and bring the police. Have them come to the back. I don't want him to see. I don't want him to see."

When I asked her, "How did you feel about this? You know, you call the police, the officers transporting you from urgent care to ER?" she starts crying. This isn't what she wanted. She had never done anything like this before, but this was different, and how hard it was because she loved him. She loved him, but this time was different.

And she told you about the injuries, about how they lasted for weeks, about the stares, about the pain, about how her life was affected, about the scars, the constant reminder of what he did to her, about this life they had together, about

how it is now over. And she still can't escape it. She looks at it every day in the mirror still, six months later.

On February 1st, 2013, the Defendant attacked Amy Yeager and recklessly inflicted substantial bodily harm. He attacked her over and over again. He left lasting injuries, injuries that lasted for weeks. But the disfigurement, both emotional and physical, it's still there today. I would ask you to find him guilty.

RP 498-515.

Olmsted was convicted of assault in the second degree, domestic violence. CP 47. His conviction was affirmed on direct appeal. The State responded to this petition on August 3, 2016. This response incorporates the State's initial response in full.

RAP 16.9 STATEMENT

RAP 16.9(a) says the Respondent "should also identify in the response all material disputed questions of fact." The State hereby declares that if any fact averred by the defendant would in any way dispute, refute, rebut, negate, contradict, undermine, or undercut any fact in the record or verdict of the jury, it is a disputed question of fact. Unless the State *specifically disavows* a fact adduced at trial, the State should be viewed as adhering to the settled record in total and to the extent anything said or averred by the defendant would stand in contrast with any fact from the record, the State disagrees with and disputes that fact. This includes any "opinion," be it by expert or lay person, which purports to

meritorious or support reversal. As to the stent issue, Olmsted claims that because Dr. Martin, the ER doctor who treated the victim after the assault, didn't know about any heart issues, that must mean that anyone and everyone else is lying. This claim is simply bizarre, given that Dr. Martin saw the victim many months *before* her heart attack. Why would it be strange that Dr. Martin wouldn't know about heart issues that hadn't yet occurred? Olmsted seems maniacally focused on the fact that the deputy prosecutor included things in her motion that aren't in the letter, to wit: the hospitalization and stent issues. But Olmsted hasn't shown these things are *false*. He's only shown they aren't discussed in the record. If Olmsted believes Ms. Nugent, the deputy prosecutor, made these things up out of whole cloth (which would be a bizarre thing to do given that a witness having a heart attack is a good enough reason, standing alone, to get a continuance) why has he not sought a declaration from her? Olmsted was appointed counsel at public expense. If counsel wants to make arguments, he has to support those arguments with evidence. *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "If the trial court record does not support the factual allegations, then the petitioner must show through affidavits or other forms of corroboration that competent and admissible evidence will establish the factual allegations." *In re Schreiber*, 189 Wn.App. 110, 113, 357 P.3d 668, 670 (2015). As Justice Sheryl Gordon McCloud recently

pointed out in her concurring opinion in *Matter of Davis*, --Wn.2d--, --P.3d—Slip Opinion 89590-2 (May 18, 2017), counsel must seek out that evidence. Slip Opinion at 16, Gordon McCloud, J., concurring. Ms. Nugent is in private practice in Vancouver and her number and email are on the WSBA website. Why did Mr. Tiller not contact her so she could confirm or deny that she lied to the court? And why has counsel not sought and included a declaration from the alleged “family member” who would aver that the victim had only suffered chest pains, and then had evidently snowed her doctor into believing she had a heart attack? Olmsted bears the burden to produce this evidence. It is clear from the record that in addition to the letter supplied to the court, there had been some actual conversation between Ms. Nugent and the victim’s doctor. RP at 36-37. Ms. Nugent is an officer of the court, and it shouldn’t be necessary for her to limit her remarks to only those things contained in the doctor’s letter.

Olmsted seems confused as to who bears the burden in a personal restraint petition. *He* bears the burden of showing that he “has admissible, competent evidence to establish the facts that entitle him to relief.” *In re Rice, supra*, at 886. The State does *not* bear the burden of disproving unsupported arguments that are based on assumption and hearsay. A personal restraint petition is not a vehicle for discovery. *Id.* Further,

contrary to what Olmsted stated in his supplemental brief, the State did argue this case on the “merits.” Because this is a personal restraint petition alleging non-constitutional error, Olmsted must demonstrate that error occurred, and that the error resulted in a complete miscarriage of justice. A showing of a complete miscarriage of justice is a prerequisite to getting one’s conviction reversed. It is step two of the two-step showing a petitioner must make. If the State shows that a petitioner has failed to satisfy step two of a mandatory two-step process, the State has argued the merits.

In addition to showing the truth of his assertion that Ms. Nugent presented false information to the court when she referenced a heart stent and hospitalization, Olmsted must show a complete miscarriage of justice. As the State noted in its original response, Olmsted must show that the trial court would not have granted the continuance based on the facts contained in Dr. Yehudai’s letter alone. That is, he must show that it was the reference to the hospitalization and the heart stent that propelled the trial court to grant a continuance it would not have otherwise granted. If he can’t make that showing, then he can’t show an abuse of discretion. The State incorporates and relies on the case law and argument it made on abuse of discretion in its original response. Olmsted has not made this showing. Indeed, Olmsted has not even *attempted* to make this showing.

Where is the declaration from the trial judge supporting this claim?

Olmsted's lawyer should have sought such a declaration. New trials should not be awarded on assumptions.

If this Court believes resolution of this claim turns on whether the victim was actually hospitalized as a result of her heart attack or whether the victim had a heart stent, this Court must remand this matter for a reference hearing in which a different trial judge will hear testimony from Amy Yeager, Dr. Yehudai, Jennifer Nugent, and Judge Gregerson. The order should instruct the trial court to settle this matter by finding facts and resolving any credibility or factual disputes that may arise at the hearing. The order should further instruct the trial court to determine whether Judge Gregerson would not have granted the continuance in the absence of the remarks about the victim's hospitalization and the heart stent. The State generally objects to a reference hearing where the hearing is clearly going to be used as a discovery vehicle for a petition that is unsupported by admissible factual showings, but offers this remedy only so that it can be said to have preserved this as a possible remedy. See *Rice*, *supra*, at 886 ("If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the

affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.”)

Olmsted fails to prove prejudice not only because he cannot show that the trial court would not have granted the continuance based on the victim’s heart attack alone, but also because he hasn’t shown, or even argued, that he was actually and substantially prejudiced by his case going to trial on July 8, 2013, rather than June 3, 2013. He hasn’t shown the delay caused exculpatory evidence to be lost, or caused an exculpatory witness to be absent. Olmsted has cited no authority which holds that in the personal restraint context, it is enough to simply show a rule-based speedy trial violation, predicated on the idea that the trial court abused its discretion in granting a continuance, without an additional showing of actual and substantial prejudice. Olmsted’s claim fails. The State incorporates the arguments it made in its original response to this petition.

II. Prosecutorial Misconduct

a. *Alleged misstatement of the law*

Olmsted re-argues his claim that by mentioning the pain suffered by the victim in this case, the prosecutor argued to the jury that pain was enough, standing alone, to sustain a finding of substantial bodily harm and

thereby misstated the law. The State incorporates the argument it made on this issue in its original brief. The prosecutor's references to pain were not objected to at trial.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Meaning, the reviewing court will not even review the claim unless the defendant demonstrates that the

misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The reviewing court should focus more on whether the allegedly improper remark could have been neutralized by a curative instruction and less on whether it was flagrant and ill-intentioned. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Olmsted has not shown that the argument was flagrant and ill-intentioned, that it could not have been obviated with a curative instruction, or that this error caused a complete miscarriage of justice.

Olmsted's argument that the prosecutor misstated the law is simply not supported by the record. The State has reprinted the State's closing argument above. The prosecutor's remarks about the victim's pain were intended to corroborate the allegation of substantial bodily harm. The inference to be drawn from the evidence of the victim's significant pain was that she had suffered an injury which involved a temporary but substantial disfigurement, or which caused a temporary but substantial loss or impairment of the function of any bodily part or organ. The prosecutor's references to pain did not "blur" the line between pain and substantial bodily injury. Moreover, the jury was instructed on the definition of substantial bodily injury and the jury is presumed to have

followed the court's instructions absent evidence to the contrary. *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014). The jury was also instructed that lawyers' arguments are not evidence. CP 50. Olmsted's claim fails. The State incorporates the arguments it made in its original response to this petition.

b. *Alleged misrepresentation of the evidence*

Olmsted reiterates his novel claim that a prosecutor is prohibited, as a matter of law, from spending more time during closing argument talking about one witness's testimony than another's. Specifically, he complains that the State should have spent more time talking about Dr. Martin's testimony and less time talking about Ms. Yeager's and Officer Long's testimony. Olmsted cites not one case—not one—to support this new legal theory. Second, Olmsted claims there was no evidence in the record to support the prosecutor's closing argument because the testimony referred to by the State is “not supported the by the record,” and the reason it was not supported by the record is because it was “based solely on Ms. Yeager's self-reported injuries.” Brief at 21. In other words, Olmsted is apparently arguing that a victim is not a competent witness in a case involving an assault against her, and the prosecutor commits reversible misconduct if she relies in any way on the testimony of the victim. This

argument is frivolous. Since when is a prosecutor not allowed to discuss the testimony of a witness in closing argument? Where is that rule found? Is it the unwritten “cherry picking” rule, as Olmsted termed it in his brief? Olmsted, again, cites not a single case to support this new legal theory. At its root, Olmsted is arguing that where the State’s witnesses give slightly different testimony, the prosecutor is permitted only to mention the witness whose testimony might be less damaging to the defendant, and required to ignore the other testimony that was introduced at trial. This argument is unsupported by any legal authority, and Olmsted has thus failed in his burden of showing a complete miscarriage of justice. The State incorporates the arguments it made in its original response to this petition.

c. *Ineffective assistance of counsel*

Olmsted argues that his lawyer was ineffective for failing to object to prosecutorial misconduct. But Olmsted hasn’t carried his burden of showing misconduct, so he cannot show prejudice from counsel’s decision to not object. And even if there was, Olmsted has not shown that the verdict in the case would probably be different had the jury been given a curative instruction. Olmsted seems to ignore that the evidence against him was very strong. His claim of self-defense was specious and was

severely undermined by the testimony of Lukas McNett and by his own statements that were introduced into evidence. The State incorporates the arguments it made in its original response to this petition.

III. Appellate Costs

Olmsted objects to the imposition of appellate costs. But this isn't an appeal. It's a personal restraint petition. This is a civil matter, and costs are statutory. Further, the State has not yet sought the imposition of costs, so such a motion is premature.


CONCLUSION

The State asks this Court to deny the personal restraint petition.

DATED this 21st day of June 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
ANNE M. CRUSER, WSBA #27944
Senior Deputy Prosecuting Attorney
OID #91127

CLARK COUNTY PROSECUTING ATTORNEY

June 21, 2017 - 4:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 48730-6
Appellate Court Case Title: Personal Restraint Petition of Michael Don Olmsted
Superior Court Case Number: 13-1-00226-4

The following documents have been uploaded:

- 1-487306_Personal_Restraint_Petition_20170621162024D2632378_2678.pdf
This File Contains:
Personal Restraint Petition - Response to PRP/PSP
The Original File Name was Brief - Supplemental Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- bleigh@tillerlaw.com
- ptiller@tillerlaw.com

Comments:

SUPPLEMENTAL RESPONSE TO PRP

Sender Name: Jennifer Casey - Email: jennifer.casey@clark.wa.gov

Filing on Behalf of: Anne Mowry Cruser - Email: Anne.cruser@Clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:

Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA, 98666
Phone: (360) 397-2261 EXT 4476

Note: The Filing Id is 20170621162024D2632378